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DONNA CORBELLO

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

DONNA CORBELLO, an individual,  
  
PLAINTIFF,  
  
vs.  
  
THOMAS GAETANO DEVITO, an  
individual, *et al.*,  
  
DEFENDANTS.

CASE NO. 2:08-cv-00867-RCJ-PAL

**PLAINTIFF'S MOTION FOR  
RECONSIDERATION BY THE  
UNITED STATES MAGISTRATE  
JUDGE OF HER *ORDER* DATED  
NOVEMBER 12, 2010 (DOC. 345)**

Plaintiff, Donna Corbello, by her attorneys, herewith moves the Honorable Peggy A. Leen,  
United States Magistrate Judge, to reconsider her *Order* (Doc. 345) of November 12, 2010 ("Order")

concerning Plaintiff's *Cross-Motion to Compel* (Doc. 326) and *Cross-Motion for Sanctions re: Discovery* (Doc. 327),<sup>1</sup> based on the availability of new evidence, including evidence of improper certifications under Fed. R. Civ. P. 26(g)(3); the need to correct clear error, and, to prevent manifest injustice.<sup>2</sup>

### **INTRODUCTORY STATEMENT**

1. On November 12, 2010, the Court entered its *Order*, denying the New Defendants' *Motion for Protective Order* (Doc. 298), granting in part, and denying in part, Plaintiff's *Cross-Motion to Compel* (Doc. 326), denying Plaintiff's *Cross-Motion for Sanctions* (Doc. 327), and, ruling on other disputes identified in the *Joint Status Report* (Doc. 335), filed after Court-ordered discovery conferences in July and August 2010, discussed at a hearing held on August 12, 2010, and briefed in *Proposed Findings and Orders* filed by the parties on August 13 and 16, 2010, respectively. (See Docs. 337 & 339.)

2. The Court's *Order* relied, for key findings of fact, on representations made and certified by Defendants and their counsel, in: (a) *Declarations Under Penalty of Perjury* signed by Defendants Brickman and Elice, and attorney, David Korzenik; (b) the *Motion for Protective Order*, *Response*, *Reply*, *Joint Status Report*, and *Proposed Findings and Order*, signed by defense counsel, under penalty of Fed. R. Civ. P. 26(g)(3); and, (c) the arguments of defense counsel at the hearings held by the Court. (See, e.g., Doc. 345 at 3, 4, 5 6-7, 9-10.) Although Plaintiff believed that documents filed with her *Cross-Motions* and *Reply* (Doc. 331) amply called these representations into question, the Court stressed, at the July 13, 2010 hearing, that they must be deemed true, absent evidence to the contrary, due, *inter alia*, to the seriousness of the certifications, and the penalties

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<sup>1</sup>Reconsideration is not sought with respect to the denial of the New Defendants' *Motion for Protective Order* (Doc. 298.)

<sup>2</sup>This *Motion* is not intended to comprise "objections" for the United States District Judge under Fed. R. Civ. P. 72, but is a request for reconsideration by the Magistrate Judge of her own ruling, for the reasons cited herein. Plaintiff reserves the right to file objections if her present request is rejected, noting that the time limit for filing objections does not run while a timely motion for reconsideration is pending. See, e.g., *Comeau v. Rupp*, 142 F.R.D. 683 (D. Kan.1992); *Epperly v. Lehmann Co.*, 161 F.R.D. 72 (D. Ind.1994).

1 associated with violations of the Rule, as shown in the following colloquy between the Court and  
 2 Plaintiff's counsel, concerning Defendants' production of scripts, and drafts of scripts, for *Jersey*  
 3 *Boys*:

4 **THE COURT:** -- and *you have read the declarations of the clients and you've read*  
 5 *the declarations of opposing counsel and you've read the representations that are*  
 6 *made under penalties of Rule 11 about what they produced and they've given you*  
*absolutely every draft that they have, what reason do you have to believe that*  
*those representations are not accurate* other than you still want the native files?

7 **MR. PAUL:** And we have to take their word for that because of, you know --

8 **THE COURT:** *Everybody has to take everybody's word for discovery responses,*  
 9 *don't you? When you sign a discovery response under penalty of Rule 11 and when*  
*your client verifies Answers to Interrogatories, that is --*

10 **MR. PAUL:** Yeah. But we -- we've had --

11 **THE COURT:** -- *a representation.*

12 (Doc. 334 at 39) (emphasis added).<sup>3</sup>

13 3. Based on this reliance, the Court accepted, as true, the following representations by  
 14 Defendants and their counsel: (1) that Defendants Brickman and Elice produced to Plaintiff, before  
 15 the August 12 hearing, or shortly thereafter, all information contained in the MovieMagic®  
 16 Screenwriter native files, in PDF format (Doc. 345 at 3, ¶ 2); (2) that said Defendants also produced  
 17 during this period, "absolutely every draft [of the *Jersey Boys* script] they have" (*id.*, and Doc. 334  
 18 at 39), including drafts of the abridged *libretto* in the *Jersey Boys* coffee table book (Doc. 345 at 4),  
 19 rendering the native files duplicative (*id.*); (3) that said Defendants had similarly produced all  
 20 responsive emails and ESI in their possession, for the period preceding January 2007 (*id.*, at 6-7);  
 21 (4) that January 1, 2007 marked the end of the "creative period" for *Jersey Boys*, warranting temporal  
 22 limitations on certain discovery (*id.*, at 10); (5) that communications with or between the writers after  
 23 January 1, 2007 would not likely provide information regarding their engagement (*id.*, at 9); (6) that

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 25  
 26 <sup>3</sup>The Court referred to "Rule 11" at the hearing, but for discovery motions, responses, and  
 27 objections, the applicable Rules are Fed. R. Civ. P. 26 through 37, and, in particular, Fed. R. Civ.  
 28 P. 26(g) and 37(a)(4). See Fed. R. Civ. P. 11(d); Fed. R. Civ. P. 26(g) *Advisory Committee Notes*  
 (1983 Amendments); *ClearValue, Inc. v. Pearl River Polymers, Inc.*, 242 F.R.D. 362, 375 (E.D. Tex.  
 2007); *Project 74 Allentown, Inc. v. Frost*, 143 F.R.D. 77, 84-85 (E.D. Pa. 1992).

1 discovery of communications with and between said Defendants, relating to their compensation and  
2 income from *Jersey Boys* should be barred following January 1, 2007, because documents regarding  
3 these topics “will continue to be produced” by Defendant, Dodger Theatricals (*id.*); (7) that defense  
4 counsel have produced the locations and dates of *Jersey Boys* performances in “numerous ways,”  
5 making the production of post-January 1, 2007 communications on these topics unnecessarily  
6 burdensome (*id.*); and, (8) that Plaintiff’s concerns regarding the adaptation of *Jersey Boys* for film  
7 are speculative, or pertain only to prospective infringements, and do not support the discovery of  
8 communications concerning same. (*Id.*). The Court further accepted as true, representations in the  
9 *New Defendants’ Disclosure of Document Retention and Preservation* (Doc. 317-18), signed and  
10 served by defense counsel on March 18, 2010, and the *Declarations Under Penalty of Perjury* of  
11 Defendants Brickman and Elice (Docs. 298-1 & 298-2), that the writers generally collaborated in  
12 person, exchanging emails only rarely, and that Defendant McAnuff, the *Jersey Boys* director, did  
13 not use email at all during the “creative period.” (See Docs. 317-18, at 5-6; 298-1, at 3-4; 298-2, at  
14 3; 334 at 42-43.)<sup>4</sup>

15 3. Unfortunately, based on newly-available evidence, it appears that the Court’s reliance  
16 on these representations was misplaced, and the certifications of Defendants Brickman, Elice, and  
17 their counsel, were “improper,” under Fed. R. Civ. P. 26(g)(3). Specifically, documents obtained  
18 from the New Defendants, and third parties, after the August 12, 2010 hearing, after the submissions  
19 of *Proposed Findings and Orders*, and both before, and after, the November 9, 2010 Status  
20 Conference, as described in the *Declaration of Gregory H. Guillot Under Penalty of Perjury*  
21 (“Guillot Declaration”), attached as *Exhibit 1*, reveal facts that cannot be reconciled with the  
22 representations on which the *Order* relied. These documents show, *inter alia*:: (1) that Defendants  
23 Brickman and Elice misled Plaintiff and the Court concerning their use of the *MovieMagic*®  
24

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25  
26 <sup>4</sup>At the July 13, 2010 hearing, apparently referencing these *Declarations*, and the *Disclosure*  
27 of *Document Retention and Preservation*:, the Court noted: “And if you had only, in my view,  
28 provided the specificity that you contain in your papers about what you did and when you did and  
what documents you have and what you don’t and in what format, this matter could have and should  
have been resolved long ago.” (Doc. 334 at 10.)

1 *Screenwriter* software, which they actually worked with for more than two years, both during the  
2 writing of “Oh What a Night,” *Jersey Boys*’ predecessor, and during the primary *Jersey Boys* creative  
3 period, with Elice sending contributions to Brickman for incorporation into the text, while Brickman  
4 maintained “master copies” of the scripts in a *MovieMagic*® directory on his computer; (2) that  
5 additional notes, not previously disclosed, including notes prepared by Defendant Gaudio, were  
6 maintained by Defendant Brickman in *MovieMagic*,® and provided to Defendant Elice in that  
7 format; (3) that Brickman used color coding, available within *MovieMagic*,® to distinguish current  
8 drafts from earlier ones; (4) that Defendants Brickman and Elice, as of August 12, 2010, had  
9 produced only a ***fraction*** of the *Jersey Boys* scripts, drafts, and notes they possessed, rather than  
10 “every draft they have,” as represented, and over 30,000 pages of additional scripts, drafts, and notes  
11 were “dumped” on Plaintiff’s counsel just prior to the November 9, 2010 Status Conference; (5) that  
12 said Defendants, contrary to their sworn representations, communicated by email almost daily about  
13 the *Jersey Boys* script and revisions during the primary creative period, sometimes exchanging  
14 messages more than once per day; (6) that Defendant McAnuff also communicated frequently by  
15 email during the primary creative period, rather than “not at all,” as represented; (7) that Defendants  
16 Brickman and Elice had not produced as of August 12, 2010, and still have not produced, all  
17 responsive emails and ESI in their possession for the period preceding January 2007; (8) that the  
18 *Jersey Boys* creative period did not end in January 2007, and material revisions are still being made  
19 to the script; (9) that relevant, responsive documents exist concerning the engagement, income, and  
20 compensation of Brickman and/or Elice for *Jersey Boys* after January 1, 2007; (9) that Plaintiff  
21 cannot rely on financial documents from Defendant, Dodger Theatricals, to verify the *Jersey Boys*-  
22 related income of the writers, because, *inter alia*, Dodger Theatricals no longer owns the production,  
23 having transferred its rights in *Jersey Boys* to Jersey Boys Broadway Limited Partnership – a detail  
24 the New Defendants have withheld from Plaintiff; and, (10) that Plaintiff’s concerns regarding the  
25 adaptation of *Jersey Boys* for film are not speculative, as a deal has been reached for such adaptation,  
26 and another document indicates that the original Broadway production of the musical may have been  
27 filmed, in high-definition format, with surround sound, for future theatrical use.

28 4. Whereas, the improper certifications of Defendants and their counsel, materially

1 impacted the *Order*, and/or were repeated as findings therein, and whereas, the *Order* will likely  
 2 deprive Plaintiff of essential discovery, Plaintiff respectfully asks the Court to reconsider, and  
 3 modify the *Order*, based on the new evidence herein supplied.<sup>5</sup> In support whereof, the following  
 4 is shown.

### 5 ARGUMENT

#### 6 **I. THE MAGISTRATE JUDGE SHOULD RECONSIDER, AND MODIFY THE ORDER** 7 **BASED ON NEWLY-AVAILABLE EVIDENCE, INCLUDING EVIDENCE OF** 8 **DISCOVERY MISCONDUCT.**

##### 9 **A. The Applicable Standard.**

10 Although the Federal Rules of Civil Procedure do not mention petitions for rehearing or  
 11 motions for reconsideration, it is well-settled that district courts have the inherent power to revise,  
 12 correct, and alter interlocutory orders at any time prior to entry of a final judgment, *Akers v. Keszei*,  
 13 2010 U.S. Dist. LEXIS 108159, 5-6 (D. Nev. Oct. 7, 2010) (citing *Sch. Dist. No. 5 v. Lundgren*, 259  
 14 F.2d 101, 105 (9th Cir. 1958); *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571-72 (7th Cir.  
 15 2006)); *Wentner v. Ridgewood Energy Corp.*, 1993 U.S. Dist. LEXIS 21249, 7-9 (N.D. Cal. Sept.  
 16 30, 1993), and a magistrate judge may reconsider her own rulings. *See, e.g.*, Wright, Miller &  
 17 Marcus, *Federal Practice and Procedure*: Civil 2d § 3069, 31769-31771 (2010); *Chase Manhattan*  
 18 *Bank v. Iridium Africa Corp.*, 294 F.Supp.2d 634 (D. Del.2003). However, motions for  
 19 reconsideration are not vehicles for unsuccessful parties to “rehash” arguments previously presented.  
 20 *E.g.*, *Coleman v. Schwarzenegger*, 2008 U.S. Dist. LEXIS 51343 (E.D. Cal. June 17, 2008).  
 21 *Henderson v. Alameda County Med. Ctr.*, 2007 U.S. Dist. LEXIS 83679 (N.D. Cal. Nov. 2, 2007).  
 22 Instead, the grounds which justify reconsideration “involve an intervening change of controlling law,  
 23 the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.”  
 24 *Henderson v. Alameda County Med. Ctr.*, 2007 U.S. Dist. LEXIS 83679 (N.D. Cal. Nov. 2, 2007)  
 25 (citing *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989); *United*

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26 <sup>5</sup>Plaintiff does not seek reconsideration of the Court's rulings regarding the discovery of  
 27 documents from the two copyright litigations in which the New Defendants were recently involved  
 28 (Doc. 345 at 11), the production of privilege logs (*id.* at 12), or the identification of purely passive  
*Jersey Boys* investors. (*Id.* at 14-15.)

1 *States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970)). All these grounds, with the  
 2 exception of a change in controlling law, exist in this case.

3 **B. The Order's Findings and Conclusions Regarding Scripts, Drafts of Scripts,**  
 4 **"Change Pages" for the Jersey Boys Script, and, the Production of the**  
 5 **MovieMagic® Screenwriter Native Files Should be Modified in View of Newly-**  
 6 **Available Evidence.**

7 The Order's central finding regarding Plaintiff's *Cross-Motion to Compel* the production of  
 8 scripts, drafts of scripts, change pages for scripts, and, the *MovieMagic® Screenwriter* native files,  
 9 is that Defendants Brickman and Elice, alone, or in conjunction with Defendant, Dodger Theatricals,  
 10 had, by August 12, or shortly thereafter, "produced absolutely every draft that they have." (Doc. 345  
 11 at 4; Doc. 334 at 39.) In fact, this finding is treated as irrefutable, as the Order includes no directive  
 12 to the subject defendants to produce all remaining such materials within their possession, custody,  
 13 or control. The finding was based on Defendants' ongoing representations, in their briefs,  
 14 *Declarations Under Penalty of Perjury*, and the oral arguments of counsel, that the 270 scripts,  
 15 drafts, fragments, and notes previously produced were all that Defendants' possessed, and more than  
 16 Plaintiff deserved, as defense counsel intentionally "erred" in producing "everything of a kind," even  
 17 though he did not deem the material relevant. (See Docs. 334 at 7-8; 325-3 at 3; 317-18 at 4; 325-1  
 18 at 3; 298-1 at 3; 298-2 at 3; 336 at 7.) This finding was also crucial to the Court's ruling that the  
 19 production of *MovieMagic® Screenwriter* native files would be "needlessly burdensome and  
 20 duplicative." (Doc. 345 at 3.) But the finding was erroneous, as the Defendants' representations on  
 21 which it was based were false.

22 As set forth in the *Guillot Declaration*, at ¶¶ 7-8, on October 27, 2010, the New Defendants  
 23 sent a disk to Plaintiff's counsel which initially could not be processed due to data corruption, but  
 24 was corrected, using replacement files provided by defense counsel, on November 4, 2010. (*Ex. 1*,  
 25 ¶¶ 7-8.) This disk, served months after the August 12, 2010 hearing, and long following the  
 26 certifications described above, included approximately **31,368** pages of scripts, drafts of scripts, and  
 27 fragments of scripts, in **582** documents. (*Id.*) This was 1,500 more pages of material than the New  
 28 Defendants had produced up to that point, in response to all of Plaintiff's discovery requests, to every  
 New Defendant, on every topic. (*Id.*) It was also more than twice the number of script-related

1 documents served by the New Defendants previously in the case. Thus, Defendants' multiple  
2 certifications concerning the completeness of their script production, were actually made when less  
3 than half the scripts in their possession had been produced. Plaintiff submits it would have been less  
4 burdensome, and not needlessly duplicative, to produce the native files at that point, rather than  
5 photocopying, Bates-numbering, scanning, and processing, 31,368 new pages of scripts for  
6 production to Plaintiff. Moreover, this behavior, and Defendants' associated misrepresentations,  
7 give rise to suspicions, if not inferences, of greater misconduct, evidencing a motivation to avoid  
8 production of the native files at all costs.

9 Documents produced following the August 12, 2010 hearing also contradict the sworn and  
10 certified representations of Defendants and their counsel concerning the scope, nature, and timing  
11 of their use of the *MovieMagic® Screenwriter* program. For example, Defendant Elice's  
12 *Declaration Under Penalty of Perjury*, dated June 10, 2010 (Doc. 325-1), infers that he used Word  
13 and RTF files,<sup>6</sup> between 2002 and 2004, and states that experimented with *MovieMagic®* "only  
14 within the period from" February through November 2005, when he tried to familiarize himself with  
15 the program. (*Id.* at 3.) However, as shown in the true copies of emails between Defendants  
16 Brickman and Elice, attached under seal, as *Exhibit 2*, the parties actually began collaborating with  
17 the program at least as early as **April 3, 2002**, when writing "Oh What A Night," the predecessor  
18 of *Jersey Boys*, and script files used with the program at that time were stored in a directory labeled,  
19 "C:\Movie Magic Screenwriter\Scripts\" (*Ex. 2* at 2-3.) These messages evidence that Defendant  
20 Brickman maintained the "master scripts" on his computer, incorporating Defendant Elice's changes  
21 thereto (*id.* at 5, 7-10), and, that used the program's color coding features to distinguish recent scripts  
22 from previous drafts. (*Id.* at 9.)

23 Yet two aspects of the emails shown in *Exhibit 2* are even more significant. First, the  
24 messages establish that the writers used the *Screenwriter* program for *Jersey Boys* through August  
25 6, 2004. (*Id.* at 4-10.) As shown in the communications attached under seal as *Exhibit 3*, this  
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27 <sup>6</sup>As noted repeatedly in Plaintiff's briefs and *Proposed Findings and Order*, *MovieMagic®*  
28 *Screenwriter* works with Word and RTF files, which can be imported into the program.

1 coincides precisely with the principal “creative period” for the musical, as the initial completed script  
2 was dispatched to Defendants Valli and Gaudio in mid-June 2004; was approved by these  
3 Defendants on July 7, 2004, and the “Full Draft Final,” was completed on August 3, 2004 (*Ex. 3* at  
4 2-3, 6.) Thus, the principal initial writing of *Jersey Boys*, commencing shortly after Defendants  
5 received of a copy of the Work, and leading to the initial rehearsals in La Jolla, California, was  
6 accomplished using the *MovieMagic®Screenwriter* program, and this is the primary period in which  
7 the principal adaptation, use, and copying of the Work would have occurred. Moreover, as set forth  
8 in Defendant Elice’s earlier *Declaration* (Doc. 325-1), his use of the program continued through  
9 November, 2005, when *Jersey Boys* debuted on Broadway – meaning the *MovieMagic®* software  
10 was actually used from the time of *Jersey Boys*’ creation to its Broadway debut. As such, the native  
11 files, including the files contained in the *MovieMagic®* “scripts” directory, almost certainly contain  
12 the most comprehensive information and material relating to the creation of the allegedly infringing  
13 derivative work. Second, the fourth email included in *Exhibit 2*, indicates that the *MovieMagic®*  
14 file sent to Defendant Elice by Defendant Brickman on June 30, 2004 included “notes” from Bob  
15 [Gaudio]. (*Ex. 3* at 5.) Upon information and belief, no such notes have been produced to Plaintiff,  
16 although they are clearly discoverable, and presumably, still available, within the native files.

17 Plaintiff submits that the foregoing evidence, which was not available during the briefing or  
18 oral argument phases of her *Cross-Motions*, establishes that the subject Defendants, and their  
19 counsel, have abused the discovery process, in violation of Fed. R. Civ. P. 26(g), by misrepresenting  
20 the role of the *MovieMagic® Screenwriter* software in the creation of *Jersey Boys*, tendering false  
21 statements regarding the dates on which it was used, and misrepresenting the discoverable material  
22 contained therein. Additionally, the foregoing evidence reveals that further scripts are likely  
23 available within the native files, which have yet to be produced, in any form. Upon information and  
24 belief, Defendants Brickman and Elice have never produced drafts, fragments or notes relating to  
25 their work on “Oh What a Night,” even though they have alleged that material in *Jersey Boys* which  
26 Plaintiff views as similar to the Work actually was derived from the “Oh What a Night” script. (See,  
27 e.g., Doc. 325-1 at 4-5; 325-2 at 4-5.) Plaintiff is entitled to this material, which Defendants have  
28 interposed as a defense, and the desired format of such production remains the *MovieMagic*

1 *Screenwriter*® native files.

2 Finally, as noted in the *Guillot Declaration* at ¶ 9, many, if not most, of the new scripts,  
3 fragments, and drafts, contained in the New Defendants' October 27/November 3 production disks  
4 are undated, making it impossible to determine which script was prepared when, and by whom, and  
5 impossible to construct a sequence or time line of script revision events. (*Ex. I*, ¶ 9.) Exemplary  
6 cover pages from several of the 31,368 pages of recently-produced scripts are attached, under seal,  
7 as *Exhibit 4*. As the Court can see, each first page differs, but there is no indication of when these  
8 drafts were prepared, or even which production of *Jersey Boys* to which they pertain. (*Id.*) Nor will  
9 it be possible to reconstruct the script chronologies in a 7-hour deposition with one of the writers.  
10 The New Defendants offer no solution to this problem, but one exists, in the form of the  
11 *MovieMagic*®*Screenwriter* software. The “.SCW” files included within the software, coupled with  
12 a copy of the “scripts” directory, which may include Word, RTF, or other types of files, will permit  
13 Plaintiff’s counsel to navigate, as easily as Defendants, the various changes that have been made to  
14 the *Jersey Boys* script, as well as to the script for “Oh What a Night.” In view of Defendants’  
15 obfuscation, false certifications, and misleading testimonies, and the difficulties involved in working  
16 with thousands of pages of undated, but closely-related documents, Plaintiff’s submits that her need  
17 for the native files significantly outweighs any burden their production would cause Defendants.  
18 Indeed, it is difficult to conceive of what Defendants’ burdens would be – all that is required is to  
19 copy the “scripts” directory, and native SCW files to a thumb drive, and provide it to Plaintiff’s  
20 counsel, and Plaintiff will be happy to supply a thumb drive for this purpose.

21 In sum, Plaintiff respectfully requests that the Court reconsider its *Order* pertaining to the  
22 production of scripts, fragments, drafts of scripts, and native files, and direct Defendants Brickman  
23 and Elice to produce all such documents which remain in their possession, in *Screenwriter*-  
24 compatible format. Alternatively, if the Court still feels such production is inappropriate,  
25 notwithstanding the evidence presented herein, Plaintiff requests that said Defendants be ordered to  
26 produce an index, at minimum, identifying the date of each script or fragment, and the production  
27 to which it pertains. Without one of these modifications to the *Order*, Plaintiff’s ability to  
28 effectively use and refer to the scripts and drafts in this litigation will be impaired, as will her work

1 with her expert witness(es), who must be able to reasonably track the evolution of the play.<sup>7</sup>

2 C. **The Order's Findings and Conclusions Regarding Emails and Correspondence**  
 3 **Requested in Plaintiff's Requests for Production Nos. 9 and 16, and the**  
 4 **Temporal Limitations Imposed on Discovery, Should Also Be Modified in View**  
 5 **of Newly-Available Evidence, and to Prevent Manifest Injustice.**

6 The Court's *Order* concerning Plaintiff's *Cross-Motion to Compel* the production of  
 7 responsive emails from Defendants Brickman and Elice, is also grounded, in large part, in  
 8 certifications made by said Defendants, and their counsel, under Fed. R. Civ. P. 26(g), which newly-  
 9 available evidence indicates were "improper." Fed. R. Civ. P. 26(g)(3).

10 As a threshold matter, it is now apparent, based on newly-available evidence, that Defendants  
 11 Brickman and Elice improperly certified the extent of their "email" relationship, in an attempt to  
 12 avoid the production of incriminating emails to Plaintiff. In their belated *Disclosure of Document*  
 13 *Retention and Preservation*, under Fed. R. Civ. P. 26(a)(1)(A)(ii) and 26(f)(3)(C), said Defendants  
 14 certified, through Mr. Korzenik, their attorney, that "[i]t was not their practice to use email to do  
 15 substantive work on the play" (Doc. 317-18 at 4-5), and identical statements were contained in their  
 16 *Declarations Under Penalty of Perjury*. (Docs. 298-1 at 3, 298-2 at 3.) Yet, the evidence now  
 17 indicates that said Defendants communicated *frequently* by email, at least several times per week,  
 18 and often more than once per day, and such emails were generally devoted to substantive work on  
 19 the *Jersey Boys* script, including work on portions cited as infringing in Plaintiff's *Second Amended*  
 20 *Complaint* (Doc. 107.) A sampling of such emails is attached under seal as *Exhibit 5*, and a review  
 21 of the content reveals glaring conflicts with Defendants' representations to Plaintiff and this Court.  
 22 For example, one email in *Exhibit 5* concerns the drafting of the "Walk Like A Man" scene in *Jersey*  
 23 *Boys*, which Plaintiff has alleged was appropriated almost *verbatim* from the Work. (*Ex. 5* at 3.)  
 24 Others discuss changes to dialogue, the development of the Tommy DeVito character, modifications  
 25 to sequences involving "Lorraine," a character Plaintiff alleges was adapted from the Work, the mob  
 26 "sit-down" scene, which Plaintiff also alleges was unlawfully appropriated, and the introduction of

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26 <sup>7</sup>In this regard, Plaintiff further notes that the Dodger Theatricals "master list" of script  
 27 changes does not facilitate her efforts to track changes in the play. Although the "master list" does  
 28 indicate, for each page, the date on which the most recent change occurred, it does not identify what  
 the change was, or provide access to the previous version of the dated page.

1 new verbiage, in September 2004, taken directly from the Work (“We weren’t a social movement  
2 like the Beatles”). (*See generally, Ex. 5.*)

3       Additionally, as shown in the email correspondence attached under seal as *Exhibit 6*, while  
4 certifying falsely, in their *Disclosure of Document Retention and Preservation*, that they did not use  
5 email for substantive work on the play, Defendants Brickman and Elice were also withholding  
6 emails with incriminating admissions about the Work, including admissions that they were aware  
7 it was not written solely by DeVito, and admissions that they intended to duplicate and distribute it,  
8 though they had been instructed not to do so. (*Id.*) Had Plaintiff not proceeded with her *Cross-*  
9 *Motion to Compel*, she would not likely ever have received this material. Nonetheless, there is  
10 evidence that other responsive, incriminating emails exist, that are still being withheld from Plaintiff.  
11 Attached under seal as *Exhibit 7*, is a July 2005 email from Defendant Elice to nonparty witness,  
12 Charles Alexander, obtained by *subpoena duces tecum*, which has not been produced by Elice in this  
13 case. The email contains admissions regarding Elice’s familiarity with Mr. Woodard, his awareness  
14 that Mr. Woodard wrote most of the Work, and the importance of the Work to *Jersey Boys*, while  
15 also stating falsely, that he returned the Work to Defendant DeVito shortly after it was obtained, and  
16 was unable to spend much time reviewing it. It is particularly curious that this email has not been  
17 produced, given that emails from this time period are represented in Defendant Elice’s production.  
18 However, the motive for such non-production is apparent, in a case involving willful copyright  
19 infringement.

20       The Court’s *Order* presumes that all unprivileged, responsive emails from the computers of  
21 Defendants Brickman and Elice, relating to the so-called “creative period,” prior to January 1, 2007,  
22 were produced to Plaintiff by August 12, 2010. (Doc. 345 at 6.) The *Order* incorporates this  
23 presumption because defense counsel represented this to be true in the *Proposed Findings and Order*  
24 signed under penalty of Rule 26(g), filed on August 13, 2010. (*See* Doc. 337 at 4.) However, this  
25 certification, like the others discussed hereinabove, was false when made, and upon information and  
26 belief, remains so. First, although Defendants’ production disk dated “August 10, 2010” contained  
27 many emails from and to Defendants Brickman and Elice (which were not available for review by  
28 Plaintiff’s counsel until September 10, 2010), *Guillot Declaration* at ¶ 3, many of the emails

1 referenced attachments – even showing the file names therefor – but none were produced. *Id.*, ¶ 4.  
2 Plaintiff’s counsel raised this issue with Mr. Korzenik, and was advised that he would “look into”  
3 why they were not included, but Mr. Korzenik never followed up on this request. Thus, much of the  
4 production tendered to Plaintiff on the “August 10, 2010” disk, consisted of material like that  
5 attached hereto under seal, as *Exhibit 8*. This cannot comprise “complete production” of responsive  
6 ESI predating January 1, 2007, and accordingly, Defendants’ certification was improper. Moreover,  
7 the New Defendants produced numerous additional emails from and to Defendants Brickman and  
8 Elice which pre-dated January 1, 2007, in late-October/early-November 2010, months after the  
9 certification was made. *Guillot Declaration*, ¶ 8.

10 Due to Defendants’ persistent, improper certifications, false *Declarations*, and withholding  
11 of relevant, responsive documents, Plaintiff cannot be confident that Defendants will comply with  
12 discovery unless they are ordered to do. Unfortunately, the *Order* includes no general directive that  
13 Defendants Brickman and Elice produce all responsive emails in their possession, pre-dating January  
14 1, 2007. Instead, it presumes such emails have been produced. Plaintiff respectfully requests that  
15 Defendants be ordered to produce this material, even though they have certified that this has been  
16 accomplished. Otherwise, Defendants will simply focus on the search term procedure outlined for  
17 certain post-January 2007 discovery, and forget about the past.

18 For the same reasons, Plaintiff respectfully requests reconsideration of those portions of the  
19 *Order* which require a search term procedure for the relevant, post-January 1, 2007 communications  
20 of Defendants Brickman and Elice. In view of the New Defendants’ extensive noncompliance with  
21 discovery, which Plaintiff will outline further in her forthcoming motions to compel, Plaintiff  
22 reasonably fears that the search term procedure will be abused, resulting in the withholding of  
23 relevant, responsive documents known by Defendants to exist, which nonetheless, were not retrieved  
24 by the search terms devised by Plaintiff. “A party’s failure to produce relevant discovery is not  
25 excused because the volume of records to be searched is vast . . .” *Stout v. Wolff Shoe Co.*, 2007  
26 U.S. Dist. LEXIS 24833, 5-6 (D.S.C. Mar. 31, 2007) (citing *Danis v. USN Communications, Inc.*,  
27 No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900, at 150 (N.D. Ill. Oct. 20, 2000) (party “responsible  
28 for knowing what documents are discoverable and where to find them” even if volume of records

1 is vast). Moreover, given that Defendants are capable of producing 45,000 documents, in short  
2 order, when it suits their purpose, *Guillot Declaration*, ¶ 7, they should also be able to review a far  
3 lower number of emails for documents responsive to Plaintiff's valid discovery requests.

4 Newly-available examples of the difficulties that may arise from such temporal limitations  
5 on discovery in this case are attached under seal as *Exhibit 9*. The first document, dated August 20,  
6 2007, is crucial, yet would not likely appear in any search terms Plaintiff could devise. The  
7 document consists of a letter from Defendant Elice to Ed Strong, confirming Elice's investment in  
8 the Las Vegas company of Jersey Boys, and enclosing a check for his initial investment. The letter  
9 is significant because it evidences that, in addition to the royalties Defendant Elice will receive from  
10 the production as book-writer, he is also part of the investment pool, entitled to a separate profit  
11 stream. (*Id.*) The words, *Jersey Boys* are not contained in the document; it simply refers to "the  
12 Vegas company" of "our show." Whereas, part of defense counsel's objection of undue burden is  
13 based on the fact that Defendant Elice has a number of shows operating simultaneously, this would  
14 be precisely the type of letter defense counsel would prefer not to search for, and it would not likely  
15 be found. Nonetheless, it is crucial to Plaintiff case, and also evidences that documents relating to  
16 Defendant Brickman's income or compensation relating to Jersey Boys will follow January 1, 2007.  
17 The communications which follow in *Exhibit 9* concern financial arrangements for the Jersey Boys  
18 Book, and bear dates in June 2007, when the deal was being negotiated. Although this document  
19 may appear in a targeted search, Plaintiff should not have to gamble with a search term procedure  
20 to obtain it, as it is crucial to her claim for damages. Finally, the last pages of *Exhibit 9* evidence that  
21 Defendant Elice subscribes to *Google Alerts* for "Jersey Boys," and Plaintiff's initial action in Texas  
22 against Defendant DeVito was reported in such alerts. Such material is relevant to the "willfulness"  
23 of Defendant's infringement, and Plaintiff should be able to obtain it, rather than hoping it might  
24 surface in a search and be produced.

25 Plaintiff also submits, based on newly-available evidence, that such temporal limitations are  
26 not justified by a purported "creative period" for *Jersey Boys* which allegedly passed in or around  
27 January 2007. Charles Alexander, an official biographer for Frankie Valli, and an authority on  
28 *Jersey Boys*, who wrote the Forward to the *Jersey Boys* Book, has interviewed Defendant Gaudio

1 for hours on its creation, and has seen the play 94 times, recently testified, in a deposition held in  
2 New York on November 11, 2010, that, with respect to the script, “there are a lot of line changes.  
3 They’ve been noodling – they’ve noodled on the individual lines all along.” *See Excerpt from*  
4 *Deposition of Charles Alexander*, attached hereto as *Exhibit 10*. Indeed, Mr. Alexander also referred  
5 to a recent change in the verbiage for in a “fake murder” scene in the front seat of Frankie Valli’s  
6 car, which has been cited by Plaintiff as a scene adapted from the Work. *Ex. 10* at 6. This new  
7 evidence confirms the evidence previously tendered by Plaintiff that potentially material  
8 modifications to the Jersey Boys script are made on an ongoing basis, and Plaintiff has a right to  
9 discover such changes as they occur, rather than hoping that they arise in a keyword search.

10 The Court’s *Order* held that Plaintiff’s would not be entitled to discovery of communications  
11 relating to the adaptation of *Jersey Boys* into film, on grounds that Plaintiff’s allegations regarding  
12 the movie are speculative, based only on information and belief. Reconsideration of this aspect of  
13 the *Order* is also respectfully requested, based on newly-available evidence, attached under seal as  
14 *Exhibit 11*. Two items of newly-available evidence are included. First attached is a proposal from  
15 Broadway Worldwide, concerning an option to film the original Broadway production of *Jersey Boys*  
16 in high-definition, with surround sound, for ultimate theatrical presentation. Such a film would  
17 infringe Plaintiff’s rights to the same extent that a live performance of *Jersey Boys* does so. Second  
18 attached, are documents relating to an agreement with GK Films, LLC, to adapt Jersey Boys into a  
19 motion picture, and as shown therein, Defendants Brickman and Elice have been named as the screen  
20 writers. *Id.* Clearly, Plaintiff’s concerns are not merely speculative, and Defendants Brickman and  
21 Elice, as the writers of the new film, are likely to have discoverable information regarding it.  
22 Plaintiff needs access to this information and material, in order to effectively prosecute her case. For  
23 the same reasons, Plaintiff’s requests for communications concerning said Defendants’ engagements  
24 relating to *Jersey Boys*, should not be cut off at January 1, 2007.

25 Plaintiff also requests reconsideration of the Court’s limitation on discovery concerning  
26 communications relating to compensation and profits accorded to Defendants Brickman and Elice  
27 for *Jersey Boys*, again based on newly-available evidence. Specifically, the Court’s holding that  
28 such materials can be obtained from Defendant, Dodger Theatricals, is no longer acceptable based

1 on newly-discovered evidence that Dodger Theatricals is no longer the owner of the *Jersey Boys*  
2 production. As shown in the documents attached under seal as *Exhibit 12*, the current owner of  
3 *Jersey Boys* is Jersey Boys Broadway Limited Partnership, and it is that entity, rather than Dodger,  
4 that licenses the production in this District. Whereas, Plaintiff is still developing information on this  
5 topic, Plaintiff submits it is premature, under the circumstances, to limit her discovery of financial  
6 information to an entity which formerly owned the production in suit.

7 **D. The Order Should Be Modified to Impose Sanctions on Defendants, and/or**  
8 **Their Counsel, Under, Inter Alia, Rule 26(g)(3)**

9 The Court's *Order* denied Plaintiff's *Motion for Sanctions*, and reconsideration of this  
10 decision is also respectfully requested, in view of the evidence submitted herewith. Plaintiff submits  
11 that the subject Defendants have been unreasonable in discovery, have made false certifications to  
12 Plaintiff and the Court, resulting in many hours of wasted time and unnecessary expense, and have  
13 actively impeded Plaintiff's attempts to obtain discovery of information and documents fundamental  
14 to her case. Additionally, reconsideration is requested, based on the newly-available evidence  
15 attached under seal as *Exhibit 13*. This material, consisting of an email to Charles Alexander from  
16 Four Seasons attorney, Peter Bennett; a response from Mr. Alexander, and a further acknowledgment  
17 from Mr. Bennett, is self-explanatory, and shows that as early as September 2008, defense counsel  
18 were aware that the allegations ultimately advanced against Plaintiff's lead counsel, in their *Motion*  
19 *for Protective Order*, were groundless.

20 **II. CONCLUSION**

21 IN VIEW OF THE ABOVE, Plaintiff respectfully requests that the Court reconsider and  
22 modify the Order, as outlined above, or as it deems appropriate, based on the new evidence  
23 submitted.

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RESPECTFULLY SUBMITTED:

Dated: November 29, 2010

By : /s/Gregory H. Guillot

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**CERTIFICATE OF SERVICE**

I, Gregory H. Guillot, do hereby certify that a true and correct copy of the foregoing document was served, by CM/ECF, on this, the 29<sup>th</sup> day of November 2010, upon each of the following:

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